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No. 96-1852

In The

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY A. BASILE,

Petitioner,

against

TOWN OF SOUTHAMPTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. GOLDSTEIN
Counsel of Record and
Attorney for Petitioner,
Dorothy A. Basile
GOLDSTEIN, GOLDSTEIN & RIKON, P.C.
Office & P.O. Address
80 Pine Street, 32nd Floor
New York, New York 10005-1771
Tel: (212) 422-4000

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INTRODUCTION

The Court of Appeals of the State of New York, in this *de jure* condemnation case, denied just compensation to Dorothy A. Basile when it limited the value of her land by denying to it any economically viable use. It held that the fundamental property right to an economically viable use, upon sale of the property to her, was not transferred to her along with the title but, instead, was transferred to the Town and State.

Pursuant to Supreme Court Rule 15.6, Mrs. Basile files this reply to the brief filed by the Town of Southampton in opposition to her Petition for Writ of Certiorari.

ARGUMENT

I

STATEMENTS MADE BY RESPONDENT IN ITS BRIEF IN OPPOSITION ARE UNTRUE AND IRRELEVANT

Respondent, (the Town) on page 4 of its Brief in Opposition (O.B.) says that Mrs. Basile conceded that because of the covenant, there was no probability of developing her property. That is not true. There was no such concession. More importantly, the covenant is irrelevant to this appeal. All the covenant states is that in order to build, Mrs. Basile must seek a permit. If requiring a permit were relevant, no property owner could make a takings claim because all property owners must get a permit in order to build.

As to its many statements in its Brief in Opposition regarding challenges to Town and other regulations, throughout its brief, the Town loses sight of the fact that this is a *de jure* condemnation, not an inverse condemnation. No challenge was made to any wetlands regulations nor could there be. Mrs. Basile no longer owned the property. Her position was simply that because any regulation that denies her an economically viable use of her property is unconstitutional, any such regulation would be overturned and the property should be valued on that basis. To do less would be to allow a condemnor to enact regulations to destroy the value of the property, then condemn it and, having caused the destruction, pay some minimal amount, denying to the owners, by the process, just compensation.

II

RESPONDENT'S ARGUMENT THAT THE COURT HAS NO JURISDICTION BECAUSE THE DECISION OF THE COURT OF APPEALS IS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS IS INCORRECT AS A MATTER OF FACT AND OF LAW

The Court of Appeals, in its decision, stated, "Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations." That sentence is the essence of the decision. Its reasoning is that the Basiles purchased the property after the enactment of the regulations. The conclusion that there is no taking is a clear application, as the Court of Appeals interprets it, of the takings clause of the Fifth Amendment to the United States Constitution and the regulatory takings decisions of this Court. In all its possible meanings, it involves a federal question and is clearly within the jurisdiction of this Court.

Mrs. Basile sought just compensation under the Fifth Amendment to the United States Constitution. The Town states, in error, that "the Court of Appeals based its decision in determining the value of property in condemnation on the long standing 'reasonable probability-incremental increase' rule as set forth in *Matter of Town of Islip v. Mascioli, supra,* [49 N.Y.2d 354, 426 N.Y.S.2d 220, 402 N.E.2d 1123]; see also *Chase Manhattan Bank v. State of New York, supra,* [103 A.D.2d 211, 478 N.Y.S.2d 983]; *Berwick v. State of New York,* 107 A.D.2d 79, 486 N.Y.S.2d 260." (O.B. 15) That is incorrect. Mrs. Basile sought compensation, asserting that rule, relying on those cases, on the reasonable probability that,

because the wetlands regulations (all of them), denied any economically viable use to the property, they would be overturned as unconstitutional and Mrs. Basile, or her successors in title, would be permitted to build. (*Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992); *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158 (1992)) The Court of Appeals declined to apply the rule because Mrs. Basile acquired the property after the wetlands regulations were enacted.

The Town cites *Michigan v. Long,* 463 U.S. 1032 (1983) for the proposition that this Court has no jurisdiction to hear this case. (O.B. pp. 14-15) It neglects, however the part of the decision which states:

> "In more recent cases, we have ourselves examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached" (463 U.S. 1038)

and concluded that:

> "dismissal is inappropriate 'where there is strong indication...that the federal constitution as judicially construed, controlled the decision below.'"

If the Town's argument were correct, neither *Lucas*, nor *Nollan*, nor *Pennsylvania Coal Co. v. Mahon* could have reached the Supreme Court. All of these dealt with the same

kind of state or municipal regulations as in the instant case. The same is true of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978) and *Lopes v. City of Peabody*, ___U.S.___, 113 S.Ct. 1574 (1993).

Mrs. Basile claimed a value based on the fact that the State and Town restrictions violated the federal constitution as applied to her property. The Court of Appeals said, that Mrs. Basile did not have that constitutional right because the regulations redefined background principles of property law. If the Town is right, all any state need do to deny jurisdiction to this Court is pass a law that redefines property rights, and apply that law, whether or not it violates provisions of the federal constitution.

III

RESPONDENT'S ARGUMENT THAT THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH DECISIONS OF ANOTHER STATE COURT OF LAST RESORT, A UNITED STATES COURT OF APPEALS OR THIS COURT IS INCORRECT

The Town argues (O.B. 24) that, "*Lopes v. City of Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (Mass. 1994) stands for the wholly unremarkable proposition under Massachusetts Law, a property owner is entitled to challenge a pre-existing land use regulation." It ignores the fact that the decision was rendered only after the case was remanded by this Court (___U.S.___, 113 S.Ct. 1574) on the basis of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), supra, the intermediate appellate court having held that Mr. Lopes had no standing to challenge the

constitutionality of the Massachusetts law because he had bought the property six years after the regulations were in place. (32 Mass. App.Ct. 1124, 595 N.E.2d 812)

What is remarkable is that the Town can try to distinguish that case from the instant case when they are almost identical and the New York Court of Appeals held, "Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations... Since claimant took title to her property subject to wetlands regulations and the encumbrances of certain covenants, she cannot claim the value of the property without such restrictions." (p. A-3 of Petition)

If the Lopes decision were the only one which conflicts with the Court of Appeals decision in the instant case, that should be sufficient. However, Mrs. Basile cited three others in her petition. The distinction the Town makes (O.B. 23) that the instant case is in the context of a condemnation case and the four cases cited are not, is a distinction that escapes us.

The Town, trying to distinguish *Moroney v. Mayor*, 268 N.J. Super. 458, 633 A.2d 1045 (1993) states (O.B. 26) that *Moroney* turned on specific language of the zoning provisions in issue which, the Town says, expressly provided that the right to apply for a variance passes to a successor in title. That is not true. Nowhere in the decision does the New Jersey court make reference to any such zoning provision. The decision relied on the fact, as we do here, that the constitutional right to challenge any restrictive regulation that denies an economically viable use is not lost upon the transfer of the property to another. Although not decided by the highest court in New Jersey, that court declined to review the case (136 N.J.

295, 642 A.2d 1004 (1994)) leaving the decision as the law in New Jersey. Hence, the conflict.

The Town argues that in *Vatalaro v. Department of Environmental Regulation*, 601 So.2d 1223 (1992), "the Court never held as a general rule that the denial of a building permit to one who purchases after restrictive regulations have been adopted is a taking requiring compensation." (O.B. 26) Mrs. Vatalaro bought after restrictions were in place and was, therefore, denied a permit. The Court said:

> "In the case at bar, all economically viable use of the property has been taken. A home cannot be constructed on it, or anything else for that matter. The language used in denying the permit makes it clear that use of the subject land is limited to just looking at it. Apparently even walking across the land is destructive to its delicate balance, as the construction of a boardwalk was suggested. This result falls within the contemplation of the cases finding a taking where all economically viable uses of the property has been prevented." (608 So.2d 1229)

As with the Vatalaro case, Petition for Review by Florida's highest court was denied, leaving this decision as the law of Florida.

In *K & K Construction, Inc. v. Department of Natural Resources*, 217 Mich.App. 56, 551 N.W.2d 413 (1996), the time to appeal had expired when Mrs. Basile's Petition was submitted. We have learned since that a late leave to appeal has been granted by Michigan's highest court. This now becomes a compelling reason to grant the Petition so that

direction, on this issue, can be given to Michigan and other states.

Although it involves a direct invasion, rather than a regulatory taking such as we have in the Basile case, the same principle was recited in *Presault v. U.S.*, 100 F.3d 1525 (1996). There the United States Court of Appeals, Federal Circuit, wrote an opinion in direct conflict with the decision of the New York Court of Appeals in the instant case.

The Town cites the decisions of several states that are "in perfect harmony" with the decision of the New York Court of Appeals in the Basile case. (O.B. 22, 23) Accepting the Town's apparent representation that all of these cases involve regulations that destroy all economically viable uses on the properties involved and that there were no other factors that influenced these decisions, these enlarge our position that, as against the decisions in New Jersey, Massachusetts, Florida, Michigan and the Federal Circuit of the United States Court of Appeals, there is a conflict between these jurisdictions which, we respectfully submit, should be resolved by this Court.

CONCLUSION

The New York Court of Appeals held that the State and the Town redefined property rights while the property was in the hands of Mrs. Basile's predecessor in title. Therefore, although he retained those rights, they were lost when the property was transferred to Mrs. Basile. In fact, they were not lost but transferred by State and Town law, to the State and Town without just compensation. If the decision of the New York Court of Appeals is allowed to remain the law of the State and of any other State that decides similarly, all any State need do is pass a law that redefines property rights and thereby

acquire them. This would be a nullification of the takings clause of the Fifth Amendment and of this Court's long line of decisions in regulatory takings cases since 1922.

Therefore, Petitioner, Dorothy A. Basile, respectfully urges the Court to grant the Petition for Writ of Certiorari.

Dated: NewYork, New York
July 3 , 1997

Respectfully Submitted,

MICHAEL J. GOLDSTEIN
Attorney for Petitioner
Dorothy A. Basile
Goldstein, Goldstein & Rikon, P.C.
Office and P.O. Address
80 Pine Street, 32nd floor
New York, New York 10005-1771
Tel: (212) 422-4000